

# THE IMPLICATIONS OF SURROGACY RECOMMENDATIONS ON CURRENT AND FUTURE REPRODUCTIVE TECHNOLOGIES

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## **Introduction**

Each of the preceding posts in this blog series have examined the practical and theoretical implications that the Law Commissions' recommendations for surrogacy law reform may have on distinct reproductive technologies. From current practices in egg freezing and donor conception, to the more innovative and future technologies of uterus transplants and artificial placentas, the implicit assumptions and substantive recommendations made throughout the Final Report will be felt in the broader landscape of assisted reproduction. This post, reflecting on the insights from our expert contributors

and discussions during the symposium, examines key themes as regards the potential impact of surrogacy law reform on other current (and future) reproductive technologies.

### **The role of regulation and the regulator**

Under the recommendations, it is proposed that the HFEA be the body responsible for overseeing the conduct of the Regulated Surrogacy Organisations (RSOs), effectively extending its remit of regulating fertility clinics. As with their current responsibilities, this would include issuing licenses, providing guidance, and oversight and enforcement. This could be positive in ensuring cohesion in the oversight of reproductive practices: if RSOs are governed by the same body and rules as fertility clinics, then there is likely to be more consistency in the approach.

However, recommendations do differ in terms of regulation amongst other reproductive practices. For example, whilst RSOs would be able to advertise for their services, it would remain prohibited to advertise for a surrogate (or for a surrogate to advertise her services). How the RSOs advertise would be subject to HFEA oversight. In contrast, the egg freezing industry is very prevalent in their online advertising, and it has been argued that the HFEA is ill-equipped to deal with the growing commercialisation of the fertility sector. It is therefore necessary to reflect on how existing reproductive practices are being advertised, and that advertising is reviewed collectively, before imposing rules on the advertising of surrogacy services. It also needs to be acknowledged that the growing use of social media means that oversight is an increasingly high administrative burden.

### **The place for (and regulation of) payment in assisted reproduction**

The Law Commissions were clear throughout the Final Report that there was no intention to move towards a commercial model of surrogacy, thus meaning that surrogacy organisations and the surrogate cannot receive payment for their services. This was a clear policy decision, with the view that altruism is, and should remain, the key guiding principle of surrogacy in the UK. Whilst the recommendations do provide a list of permitted payments (such as loss of earning, wellbeing costs, etc), compensation would not be allowed: the surrogate cannot be paid for her services of carrying the pregnancy. This prohibition on compensation has the potential to influence how payments are managed in other reproductive contexts. For example, individuals who donate their

gametes for use in donor conception can receive compensation to cover their expenses, but it is illegal to pay someone for that donation. Similarly, in accordance with current organ donation rules, payments for uterus transplantation would presumably be limited to direct re-imbusement of expenses. It is important that there remains consistency between permitted payments for surrogates under the recommendations and calculations of compensation for those who donate in other reproductive contexts.

Challenges may also arise given reproductive tourism and payment practices in other countries; individuals may engage with commercial surrogacy overseas whereby the surrogate does receive direct payment, and some jurisdictions treat gametes as a commodity subject to market values.

### **The importance of origin information**

Drawing on the HFEA Register for Donor Conception, the recommendations for surrogacy reform include the implementation of a Surrogacy Register, whereby information relating to the surrogacy birth would be stored and made available to the surrogate-born individual. The discrepancies between the Surrogacy Register and HFEA Register would need resolving, particularly in relation to the age of access. Nonetheless, considering the ever-increasing recognition of the importance for individuals to have access to birth and genetic information, this recommendation is positive and aligned with accepted human rights standards. However, the Surrogacy Register indicates the significance of something beyond genetic information (which is the priority of the HFEA Register): by stating that information relating to the surrogate, who may not be the genetic parent, must be stored, there is clear recognition of the importance of wider origin information for the child, including the nature and circumstances of their conception and birth. This could equally apply beyond surrogacy to other reproductive technologies: could or should, for example, the child know that their conception arose from frozen eggs or that the birth took place following a uterus transplant? Whilst it is not currently a priority for this type of information to be recorded and subsequently made available to the resulting child, it is important that the law is consistent as to when origin information is stored and made accessible.

### **What it means to be a 'parent'**

The current legal framework in the UK is clear: the woman who gives birth to the child is the legal mother. In most cases, this allocation of motherhood is not problematic: surrogacy is currently the only reproductive option where there is a disconnect between gestation and the intention to be a parent. The new pathway to parenthood would not fundamentally alter this legal position of gestation being determinative of parenthood. However, the ability for intended parents to assert their intention to parent without gestation before conception - and for that to be recognised from birth - is significant. The recommendation recognises intention as a valid means by which parenthood can be established. Of the other reproductive technologies examined throughout this series, this is most significant in relation to the development of artificial placentas with the potential for a foetus to be fully gestated outside of a human body. If such technology were possible, this would further erode what it means to be a 'mother' (legally speaking) because there would be no human gestation to attribute motherhood to. As such, the new pathway to parenthood may pave the way, along with future reproductive technologies, to more fundamentally re-examine how we legally define parenthood. Beyond this, surrogacy and other technologies that disrupt 'normal' gestation, demonstrate that understandings of pregnancy may shift and need to be accounted for in regulation.

## **Conclusion**

We hope that this post, and the entire series, has highlighted some of the potential implications of the Law Commissions' recommendations beyond surrogacy. As reproductive options for individuals continue to increase, it is important that different technologies are recognised and respected as different, but fundamentally interconnected, choices. Individuals considering surrogacy alongside other reproductive technologies should be confident that, where appropriate, there is a consistent approach being taken: whether that be in relation to allocation of parenthood, regulatory procedures or safeguards. Should the law on surrogacy come to be legislatively reformed, it is important that the impact of any changes is considered in this broader context.

